U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GRADY JACOBS and U.S. POSTAL SERVICE,
WESTERN REGION, San Francisco, CA

Docket No. 99-893; Submitted on the Record;
Issued January 22, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a recurrence of disability commencing September 1, 1997, causally related to his accepted April 8, 1997 injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration, pursuant to 5 U.S.C § 8128(a), of the Federal Employees' Compensation Act.

On April 8, 1997 appellant, an employing establishment officer, aggravated a low back injury while climbing a fence. Appellant stopped work on April 15, 1997 and returned to regular duty on July 1, 1997. The Office accepted the case for sacral strain on June 11, 1997.

On November 5, 1997 appellant filed a notice of recurrence disability and claim for continuation of compensation, alleging that on September 1, 1997 he sustained a recurrence of disability for which he stopped work on that date. He stated that the recurrence happened when he reached over the rear right side of his car to get into his trunk when he felt some pain. Appellant asserted that it was in the same area, the middle lower back and he believed it was related to the original injury because the pain occurred in the same area.

On January 15, 1998 the Office sent appellant a letter stating that a recurrence was a "spontaneous return or increase of disability due to a previous injury or occupational disease without intervening cause." Appellant was advised that he should submit a medical report with his physician's opinion on the relationship of the recurrence of disability to the original injury or new work injury. He was given 30 days to submit the requested information.

In a March 12, 1998 report, Dr. Joel W. Renbaum, a Board-certified orthopedic surgeon, stated that appellant was treated for complaints of neck and back pain. He noted that appellant was involved in a motor vehicle accident in June 1996 and had a work injury in April 1997. Dr. Renbaum stated that he originally saw appellant in September 1997 and treated him conservatively for possible lumbar disc. He indicated the problems persisted and a magnetic resonance imaging (MRI) was obtained. Dr. Renbaum noted the MRI demonstrated a mild

lateral disc bulge at L2-3, mild extrusion of disc at L3-4 and moderate-to-severe left disc protrusion at L4-5. He indicated that appellant was given a Medrol Dosepak and an epidural injection. Dr. Renbaum asserted that the patient was followed intermittently and was last seen in early February 1998 at which time he was discharged and had returned to work. He noted that appellant had stopped physical therapy and was functioning with work activity as of December 23, 1997 with occasional back pain.

In a May 28, 1998 decision, the Office denied appellant's recurrence claim as the medical evidence failed to establish a causal relationship between appellant's September 1, 1997 condition and the accepted April 8, 1997 sacral strain.

Appellant submitted an undated request for reconsideration, which was received by the Office on November 5, 1998. He included a newly filled out CA-2a, dated October 19, 1998, which asserted a recurrence of disability beginning September 1, 1997 originating from his April 8, 1997 injury. The Office treated this as a reconsideration request.

Appellant also included a partial report dated March 6, 1997 from Dr. Andrew V. Slucky. The report referred to an underlying degenerative condition and included a partially illegible handwritten excerpt, which referred to a March 10, 1997 matter.

In a December 8, 1998 decision, the Office determined that appellant had not provided sufficient information to warrant a merit review of the prior decision in the case.[1]

The Board finds that appellant has not met his burden of proof to establish that he sustained a recurrence of disability beginning on September 1, 1997 causally related to his April 8, 1997 employment injury.

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.[2] This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.[3] An award of compensation may not be made on the basis of surmise, conjecture, or speculation or on an appellant's unsupported belief of causal relation.[4]

[1] The Board notes that, subsequent to the Office's February 12, 1999 decision, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell,* 5 ECAB 35 (1952).

[2] *Lourdes Davila,* 45 ECAB 139 (1993); *Dominic M. DeScala,* 37 ECAB 369, 372 (1986); *Bobby Melton,* 33 ECAB 1305, 1308-09 (1982).

[3] *See Nicolea Bruso,* 33 ECAB 1138, 1140 (1982).

[4] *Ausberto Guzman,* 25 ECAB 362 (1974).

In this case, the Office accepted that appellant sustained a sacral strain on April 8, 1997. Appellant filed a notice of recurrence of disability commencing September 1, 1997. The Office requested that appellant provide medical evidence that would establish a causal relationship between his current conditions and his present disability. Appellant did not submit any medical evidence that his present condition was causally related to his April 8, 1997 employment injury. For example, appellant did not submit a medical report in which his treating physician explained why his claimed continuing condition would be related to the April 8, 1997 accepted injury. Dr. Renbaum, in his March 12, 1998 report, stated that he had treated appellant conservatively in September 1997 and noted that he had also treated appellant for a motor vehicle accident in 1996 and a work injury in 1997. However, he did not specifically support causal relationship between the accepted injury of April 1997 and the claimed recurrent injury September 1, 1997. Accordingly, the Board finds that appellant has not met his burden of proof in this case.

The Board further finds that the Office properly exercised its discretion in refusing to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:" The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary in accordance with the facts found on review may:

"(1) end, decrease, or increase the compensation awarded; or

"(2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.138(b)(1)(1998), a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[5] Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[6]

In the present case, appellant filed a request for reconsideration, which was received by the Office on November 5, 1998. Appellant submitted a partial March 6, 1997 report from Dr. Slucky. The report from Dr. Slucky is not relevant as it predates the date of the claimed recurrence of disability and he does not address the cause of appellant's condition. Appellant also stated that his pain and the symptoms stemming from his injury were continuous; however, these arguments and the evidence submitted were previously presented to and considered by the Office. The submission of evidence, which repeats or duplicates evidence already in the case record, does not constitute a basis for reopening a case.[7] In any event, the issue of causal relationship is medical in nature such that the submission of new and relevant medical evidence

[5] 20 C.F.R. § 10.138(b)(1).

[6] 20 C.F.R. § 10.138(b)(2).

[7] *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

is necessary to require a reopening of the claim. Evidence which does not address the particular issue involved also does not support a basis for reopening a case.[8]

In its December 8, 1998 decision, the Office correctly noted that appellant did not provide any new evidence or argument sufficient to warrant a merit review. Appellant did not argue that the Office erroneously applied or interpreted a point of law. Consequently, appellant is not entitled to a merit review of the merits of the claim based upon any of the above-noted requirements under 10.138(b)(1) (1998). Accordingly, the Board finds that the Office did not abuse its discretion in refusing to reopen and review appellant's claim on the merits.

The Board finds that the decisions of the Office of Workers' Compensation Programs dated December 8 and May 28, 1998 are hereby affirmed.

Dated, Washington, DC
January 22, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

[8] *Daniel Deparini*, 44 ECAB 657 (1993).